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Supreme Court, U.S.
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No. 03-1164

In the Supreme Court of the United States

ANN VENEMAN, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE, *ET AL.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PUERTO RICO, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

2. Whether the district court erred in issuing a nationwide injunction against the collection of all assessments under the Beef Act, including those from cattle producers who support the generic advertising and those used to fund activities other than generic advertising.

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of the petition for a writ of certiorari. Beef operations exist in every State, and beef production represents a substantial share of most States' agricultural output. Consistent with the States' significant economic stake in the beef industry, forty-five States have chosen to participate directly in the beef promotion, research, and information programs created by Congress in the Beef Act.

These States' beef councils annually collect and spend approximately $25 million on state-level activities authorized by the Act. These projects not only support local businesses, but also provide a vehicle for the States to develop and convey health and safety information to their citizens. By invalidating the Beef Act and affirming a nationwide injunction against collection of the Beef Act assessments, the court of appeals has terminated many of these state programs. And those programs that would continue under state-law authority have lost the benefit of uniform national procedures and collective action under the Act's carefully crafted federal-state partnership.

In addition, the ramifications of this case for the States extend beyond the Beef Act. Congress has established similar federal-state cooperative programs for other products, and almost all States have created their own commodity-marketing programs. Moreover, the court of appeals's restrictive reading of the government speech doctrine implicates the States' ability to convey any governmental message through private speakers or with funds other than general tax revenues. The State *amici curiae* ask the Court to grant the petition and resolve this important issue regarding the States' power to engage in governmental speech.

REASONS FOR GRANTING THE WRIT

The Court has previously granted review in two cases involving generic advertising disseminated through government commodity-marketing programs: *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), and *United States v. United Foods*, 533 U.S. 405 (2001). The Court decided these cases based on whether the programs impermissibly compelled subsidization of speech in violation of the First Amendment. In neither case, however, did the Court have occasion to address an alternative and equally important question—whether the challenged advertising was government speech, and therefore unconstrained by the First Amendment. *United Foods*, 533 U.S., at 417 (expressly reserving this question).

Uncertainty over application of the government-speech doctrine to these programs has been detrimental to the States. In this case, the court of appeals proceeded from the faulty premise that the government-speech doctrine does not apply to challenges to the compulsory funding of such programs, in contrast to the reasoning of three other circuits. As a result, the court invalidated a national program in which most States directly participate to boost their economies and to communicate with their citizens. Moreover, the Court's striking down the Mushroom Act advertising provisions in *United Foods* has inspired similar First Amendment challenges to other state commodity-marketing programs—litigation that now proceeds without the Court's guidance on whether the contested programs involve government speech.

The Court should grant the petition to resolve this uncertainty over application of the government-speech doctrine. This case squarely presents the question reserved by the Court in *United Foods*. And because the Secretary's and the States' roles in implementing the Beef Act evince a program of government speech under the Court's precedents, this case provides an appropriate vehicle to address the scope of that doctrine.

I. THE COURT OF APPEALS'S INVALIDATION OF THE BEEF ACT IS AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE STATES.

In the Beef Act, Congress recognized that "production of beef and beef products plays a significant role in the Nation's economy" and that "maintenance and expansion of existing markets for beef and beef products are vital to . . . the general economy of the Nation." 7 U.S.C. §2901(a)(2), (4). Current statistics bear out the continuing resonance of these findings. Beef production is the largest segment of the American agricultural economy, accounting for nearly one-fifth of total farm sales and over one million jobs.[1] In 2002, the value of receipts from cattle and calves was approximately $38 billion.[2] And on a global scale, the United States remains the world's largest producer of beef.[3]

The beef industry plays an equally important role in the economies of the several States. All States engage in beef production, and the economic impact of the industry "contributes to almost every county in the nation."[4] In forty States, cattle and calves are among the top five agricultural commodities in terms of

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1. CHRISTA HARTSOOK, IOWA STATE UNIV., COMMODITY BEEF INDUSTRY PROFILE, *at* http://www.agmrc.org/beef/profiles/commbeefprofile.pdf (last visited Apr. 14, 2004).

2. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., U.S. STATE FACT SHEET, *at* http://www.ers.usda.gov/StateFacts/US.HTM (last updated Mar. 29, 2004).

3. *See World Beef Trade Overview*, LIVESTOCK & POULTRY: WORLD MARKETS & TRADE (Foreign Agric. Serv., U.S. Dep't of Agric., Washington, D.C.), Mar. 1990, at 10, *at* http://www.fas.usda.gov/dlp/circular/2004/04-03LP/dlp4_03LP.pdf (last visited Apr. 14, 2004).

4. DAN OTTO & JOHN D. LAWRENCE, ECONOMIC IMPACT OF THE UNITED STATES BEEF INDUSTRY 1 (2001), *at* http://www.beef.org/documents/Econ%20Impact%20Beef%20v2.doc (last visited Apr. 14, 2004).

gross receipts.[5] And in thirty-eight States, the annual value of those receipts exceeds $100 million.[6] Thirty-one States have at least 10,000 beef-cattle operations.[7]

In light of the beef industry's economic significance, Congress declared in the Beef Act that it was in the public interest to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. §2901(b). Specifically, the program aims to develop "plans or projects of promotion and advertising, research, consumer information, and industry information." *Id.*, §2904(4)(B). These projects are funded through assessments on cattle sold in, or imported into, the United States. *Id.*, §2901(b).

Congress contemplated that the States would cooperate with the federal government in accomplishing the Beef Act's objectives. In passing the Act, Congress acknowledged that state organizations already were conducting promotion, research, and information activities, which were "invaluable to the efforts of promoting the consumption of beef and beef products." *Id.*, §2901(a)(5). The Act incorporates these groups into its regulatory scheme by providing for certification of "qualified State beef councils," which are authorized to carry out certain functions under the Act. *Id.*, §2902(14).

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5. *See* ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., STATE FACT SHEETS, *at* http://www.ers.usda.gov/StateFacts (last updated Mar. 29, 2004).

6. *See id.* In Texas alone, the annual value of these receipts approaches $6 billion. *Id.*

7. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 2003, Table 7-22 (2003), *at* http://www.usda.gov/nass/pubs/agr03/03_ch7.pdf (last visited Apr. 14, 2004).

Consistent with the importance of the beef industry to state economies, forty-five States have established qualified state beef councils under authority of the Beef Act. *Charter v. United States Dep't of Agric.*, 230 F.Supp.2d 1121, 1125 (D. Mont. 2002), *appeal filed*, No. 02-36140 (CA9 Dec. 24, 2002).[8] These councils further the objectives of the Act at both the national and state levels.

The state councils help implement the Act at the national level by electing members of the Beef Promotion Operating Committee ("Operating Committee"). 7 U.S.C. §§2904(1), (4)(A), 2905. The Operating Committee, along with the Cattlemen's Beef Promotion and Research Board ("Beef Board"), works with the Secretary to develop and conduct the national beef promotion, research, and information activities authorized by the Act. 7 U.S.C. §2904(2), (4), (6)-(7); 7 C.F.R. §1260.168(e), (f). In addition, the state councils are charged with collecting the assessments on cattle sales—"the beef checkoff"—that fund the national projects. 7 U.S.C. §2904(8)(A); 7 C.F.R. §1260.172.

At the state level, qualified state beef councils may retain up to half of the checkoff assessments they collect to fund state promotion, research, and information programs authorized by the Act and approved by the Secretary. 7 C.F.R. §1260.172; Trial Tr. 206-07, 316.[9] For example, the councils sponsor state-specific beef

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8. Only Alaska, Connecticut, Massachusetts, New Hampshire, and Rhode Island have not established qualified state beef councils.

9. Some qualified state beef councils choose to retain less than half of the collected assessments, remitting the additional funds to support national projects. *See, e.g.*, IOWA BEEF INDUS. COUNCIL, ABOUT THE IOWA BEEF INDUSTRY COUNCIL 1 (2004), *at* http://www.iabeef.org/Aboutus/Default.aspx (last visited Apr. 14, 2004) (noting that Iowa council retains 25% of collected assessments and contributes the remainder to national programs); KAN. BEEF COUNCIL, WHO WE ARE 1 (2004), *at* http://www.kansasbeef.org/Staff/index.htm (last visited Apr.

promotion and information activities.[10] They also support beef-

14, 2004) (relating that the Kansas council retains 15% of collected assessments and contributes the remainder to national programs).

10. *See, e.g.*, ALA. CATTLEMEN'S ASSOC., ABOUT US 2 (2000), *at* http://www.bamabeef.org/about_us1.htm (last visited Apr. 14, 2004) (explaining use of Alabama checkoff programs to increase consumer demand); GA. BEEF BD., ABOUT THE GEORGIA BEEF BOARD 1 (2004), *at* http://www.gabeef.org/gbb/aboutus.htm (last visited Apr. 14, 2004) (reporting use of assessments to develop foreign markets for Georgia beef); HAW. BEEF INDUS. COUNCIL, COLLECTION BROCHURE 2 (Mar. 1997), *at* www.hicattle.org/Industry/COLLECTIONBROCHURE.doc (last visited Apr. 14, 2004) (describing use of assessments to produce a "Hawaii Beef/Cattle Industry" brochure and to sponsor promotional events at Hawaii farm fairs); IDAHO BEEF COUNCIL, ANNUAL REPORT OF ACTIVITIES 1 (2003), *at* http://www.idbeef.org/images/2003%20Annual%20Report/2003%20Annual%20Report-Web%202.pdf (last visited Apr. 14, 2004) (noting use of assessments to send media kits regarding the Idaho beef industry to Idaho media outlets); IND. BEEF COUNCIL, BEEF CHECKOFF 1 (2004), *at* http://www.indianabeef.org/Beef%20Checkoff.htm (last visited Apr. 14, 2004) (describing use of checkoff funds for Indiana promotion activities); IOWA BEEF INDUS. COUNCIL, ABOUT THE IOWA BEEF INDUSTRY COUNCIL 1 (2004), *at* http://www.iabeef.org/Aboutus/Default.aspx (last visited Apr. 14, 2004) (reporting use of assessments to develop foreign markets for Iowa beef); MINN. BEEF COUNCIL, MINNESOTA BEEF COUNCIL 1 (2004), *at* http://www.mnbeef.org (last visited Apr. 14, 2004) (noting use of checkoff-funded programs "to strengthen the beef industry's market position in Minnesota"); MO. BEEF INDUS. COUNCIL, MBIC ANNUAL REPORT FY02 1-2 (2003), *at* http://www.mobeef.org/mbic_releases/ANNUAL%20REPORT.htm (last visited Apr. 14, 2004) (describing sponsorship of print and radio advertising in Missouri and promotional events at Missouri supermarkets); NEB. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2004), *at* http://www.nebeef.org/data/annualreport2.pdf (last visited Apr. 14, 2004) (explaining checkoff funding of Nebraska television and radio advertisements and promotional events); OKLA. BEEF INDUS. COUNCIL, OKLAHOMA PRODUCERS HELP FUND NEW YORK PROMOTION (May 13, 2002), *at* http://www.oklabeef.

related research in conjunction with state universities, government agencies, and private entities.[11] And they communicate with

org/Communications/Releases/buffalony.htm (last visited Apr. 14, 2004) (describing Oklahoma council's use of assessments to assist New York council with beef promotion campaign in western New York); OR. BEEF COUNCIL, 2002-2003 ANNUAL REPORT 1 (2003), *at* http://www.orbeef.org/New%20Ann%20Report%2002%2003.htm (last visited Apr. 14, 2004) (explaining checkoff funding of Oregon radio advertising and promotional events); S.C. BEEF BD., MISSION STATEMENT (2004), *at* http://www.sccattle.org/beef.htm (last updated Feb. 3, 2004) (noting use of checkoff funds to increase demand for beef in South Carolina); S.D. BEEF INDUS. COUNCIL, BEEF INDUSTRY COUNCIL MATERIALS (2004), *at* http://www.sdbeef.org/order%20form.htm (last updated Mar. 14, 2004) (listing checkoff-funded promotional materials published by South Dakota council); TENN. BEEF INDUS. COUNCIL, 2003 ANNUAL REPORT 1 (2004), *at* http://www.beefup.org/Tennessee%202003%20annual%20report-newsletter.pdf (last visited Apr. 14, 2004) (explaining checkoff funding of Tennessee television and internet advertisements and promotional events); VA. BEEF INDUS. COUNCIL, THE BEEF BUZZ 1 (2004), *at* http://www.vabeef.org/FoodService/BeefBuzz.aspx (last visited Apr. 14, 2004) (describing retailer-incentive program to promote beef in Virginia); WIS. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2003), *at* http://www.beeftips.com/images/annual-report-03.pdf (last visited Apr. 14, 2004) (detailing use of assessments to fund promotional activities at Wisconsin State Fair and advertising on Wisconsin radio stations).

11. *See, e.g.*, IDAHO BEEF COUNCIL, ANNUAL REPORT OF ACTIVITIES 2 (2003), *at* http://www.idbeef.org/images/2003%20Annual%20Report/2003%20Annual%20Report-Web%202.pdf (last visited Apr. 14, 2004) (describing checkoff funding of research at the University of Idaho regarding cattle diseases and the anti-carcinogenic effects of conjugated linoleic acid, a substance naturally occurring in beef); ILL. BEEF ASSOC., ILLINOIS BEEF QUALITY INITIATIVE 1 (2004), *at* http://www.illinoisbeef.com/BeefQualityInitiative.htm (last visited Apr. 14, 2004) (explaining checkoff-funded data collection program to assist in cattle health management); MO. BEEF INDUS. COUNCIL, MBIC ANNUAL REPORT FY02

consumers and producers regarding public health and safety issues associated with beef, such as the nutritional benefits of beef as well as concerns about *E. coli* and BSE, or "mad cow disease."[12] The

3 (2003), *at* http://www.mobeef.org/mbic_releases/ANNUAL%20REPORT.htm (last visited Apr. 14, 2004) (describing support of research projects at University of Missouri-Columbia relating to beef pathogen detection and control); NEB. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2004), *at* http://www.nebeef.org/data/annualreport2.pdf (last visited Apr. 14, 2004) (noting funding of *E. coli* research at University of Nebraska-Lincoln); OR. BEEF COUNCIL, 2002-2003 ANNUAL REPORT 1-2 (2003), *at* http://www.orbeef.org/New%20Ann%20Report%2002%2003.htm (last visited Apr. 14, 2004) (describing checkoff-funding of marketing feasibility study).

12. *See, e.g.*, ALA. CATTLEMEN'S ASSOC., ABOUT US 4 (2000), *at* http://www.bamabeef.org/about_us1.htm (last visited Apr. 14, 2004) (noting efforts responding to inquiries about drought and food-safety concerns); CAL. BEEF COUNCIL, STATEMENT REGARDING BSE CASE IN WASHINGTON STATE (Dec. 29, 2003), *at* http://www.calbeef.org/index.htm (last visited Apr. 14, 2004) ; IDAHO BEEF COUNCIL, ANNUAL REPORT OF ACTIVITIES 1 (2003), *at* http://www.idbeef.org/images/2003%20Annual%20Report/2003%20Annual%20Report-Web%202.pdf (last visited Apr. 14, 2004) (explaining role in responding to reports of BSE in Canada); ME. BEEF INDUS. COUNCIL, JANUARY UPDATE & INFORMATION 2 (Jan. 26, 2004), *at* http://www.mainebeef.org/mbic.htm (last visited Apr. 14, 2004) (relating efforts responding to inquiries about BSE); MO. BEEF INDUS. COUNCIL, MBIC ANNUAL REPORT FY02 3 (2003), *at* http://www.mobeef.org/mbic_releases/ANNUAL%20REPORT.htm (last visited Apr. 14, 2004) (noting work with Missouri organizations and agencies to develop an animal disease emergency response plan); NEB. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2004), *at* http://www.nebeef.org/data/annualreport2.pdf (last visited Apr. 14, 2004) (detailing participation in conference on obesity and cardiovascular disease); *Oklahoma Checkoff Responds to BSE*, DOLLARS & SENSE (Okla. Beef Council, Oklahoma City, Okla.), Jan. 2004, at 1, *at* http://www.oklabeef.org/Communications/DollarsandSense/Dollars%20and%20

councils annually spend approximately $25 million in checkoff assessments to fund these in-state programs.[13]

By holding the Beef Act facially unconstitutional and affirming a nationwide injunction against beef checkoff assessments, the court of appeals has terminated many of these state programs, including their activities unrelated to the generic advertising objected to by the plaintiffs. And those programs that would continue under state-law authority have lost the benefit of uniform national procedures and collective action under the Act's carefully crafted federal-state partnership. In so doing, the court of appeals has deprived the States of an invaluable vehicle to support a significant sector of their economies and to communicate vital health and safety information to their citizens. Moreover, as the Secretary indicates, terminating the Beef Act programs inhibits the

SensePDF.pdf (last visited Apr. 14, 2004) (listing efforts responding to inquiries about BSE); OR. BEEF COUNCIL, 2002-2003 ANNUAL REPORT 1-2 (2003), *at* http://www.orbeef.org/New%20Ann%20 Report%2002%2003.htm (last visited Apr. 14, 2004) (describing participation in seminar on irradiated beef and communications regarding nutrition, BSE, and other consumer issues); *State Partners Respond: BSE in America*, TENNESSEE BEEF INDUSTRY UPDATE (Tenn. Beef Indus. Council, Franklin, Tenn.), Feb. 2004, at 1-2, *at* http://www.beefup.org/February%20TBIC%20update (last visited Apr. 14, 2004) (noting efforts responding to BSE inquiries); TEX. BEEF COUNCIL, THE FACTS ON FOOD SAFETY 1 (2004), *at* http://www.txbeef.org/food_safety.php3 (last visited Apr. 14, 2004) (providing consumer information regarding safe storage and preparation of beef); WIS. BEEF COUNCIL, 2003 ANNUAL REPORT 1 (2003), *at* http://www.beeftips.com/images/annual-report-03.pdf (last visited Apr. 14, 2004) (detailing communications with producers regarding quality control issues at beef industry conventions and with health professionals regarding nutrition issues).

13. OKLA. BEEF INDUS. COUNCIL, THE HISTORY OF THE OKLAHOMA BEEF CHECKOFF PROGRAM 1 (2004), *at* http://www.oklabeef.org/Beeffacts/New_Oklahoma_Checkoff_History.htm (last visited Apr. 14, 2004).

ability of States outside the Eighth Circuit to advocate their interests in the Act and to litigate these issues in courts in their own circuits. Pet. at 27-28. Indeed, that was precisely the district court's intent in fashioning nationwide relief. *Livestock Mktg. Assoc. v. U.S. Dep't of Agric.*, 207 F. Supp. 2d 992, 1007 (D.S.D. 2002) (declining to limit scope of injunction on ground that it "would only encourage . . . additional lawsuits in this and other federal jurisdictions"), *aff'd*, 335 F.3d 711 (8th Cir. 2003). The Court should grant review so that the States—both inside and outside the Eighth Circuit—may be heard in regard to this sweeping annulment of the Beef Act and the effect thereof on their own state programs.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT GENERIC ADVERTISING UNDER GOVERNMENT-CREATED COMMODITY-MARKETING PROGRAMS IS GOVERNMENT SPEECH.

The Secretary aptly explains that, under the Court's decisions, generic advertising under the Beef Act qualifies as government speech unconstrained by the First Amendment. Pet. at 14-18. The court of appeals departed from this precedent in holding that the government-speech doctrine does not apply to challenges to the compulsory funding of government-created commodity-marketing programs—a question expressly reserved by the Court in *United Foods. Livestock Mktg. Assoc.*, 335 F.3d, at 719-21. In contrast, the Third, Fifth, and Sixth Circuits have reviewed such challenges first to determine whether the contested program constitutes government speech insulated from First Amendment constraints. *Pelts & Skins, LLC v. Landreneau*, __ F.3d __, No. 03-30523, 2004 WL 725275, at *4-6 (CA5 Apr. 2, 2004) (reviewing Louisiana Alligator Resource Fund); *Cochran v. Veneman*, 359 F.3d 263, 273-74 (CA3 2004) (reviewing Dairy Act); *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 161-62 (CA6 2003) (reviewing Pork Act), *petition for cert. filed*, 72 U.S.L.W. 3539 (U.S. Feb. 19, 2004) (No. 03-1180); *United States v. Frame*, 885 F.2d 1119, 1130-33 (CA3 1989) (reviewing Beef Act), *cert. denied*, 493 U.S. 1094 (1990).[14]

The Court's review is warranted to take up the question it reserved in *United Foods* and to resolve this conflict in the circuits regarding application of the government-speech doctrine. This case is an appropriate vehicle to address the contours of the doctrine because the Secretary's and the state councils' roles in implementing the Beef Act evince a program of government speech under the Court's First Amendment jurisprudence. Moreover, application of the doctrine may impact other commodity-marketing programs, which are widely used by the States to support and promote their agricultural industries.

A. Generic Advertising by State Beef Councils Under the Beef Act Is Government Speech.

As the Secretary demonstrates, the generic advertising authorized by the Beef Act constitutes government speech under the Court's First Amendment jurisprudence "because Congress specified the message, created a governmental entity to disseminate it, and vested control in a politically accountable official." Pet. at 14. The state beef councils' active role in generating and

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14. In each of these cases, the courts nonetheless concluded that the advertising authorized by the challenged program was not government speech. *Pelts & Skins*, 2004 WL 725275, at *6; *Cochran*, 359 F.3d, at 274; *Mich. Pork Producers*, 348 F.3d, at 162; *Frame*, 885 F.3d, at 1133. As the Secretary observes, these courts incorrectly focused on the fact that (1) the programs were not funded by general tax revenues, but fees imposed on industry participants; and (2) the programs are directly carried out by industry participants, albeit subject to government control. Pet. at 21. This analysis ignores the government's ability to fund its speech through "user fees" imposed on a segment of the public and to employ private speakers to convey a government message. *Id.*, at 21-22.

disseminating generic advertising under the Beef Act bolsters the Secretary's conclusion.

Just as Congress created the Beef Board to carry out the Beef Act's program, it provided for certification of "qualified State beef councils" to implement the Act at the state level. 7 U.S.C. §§2902(14). Frequently, these entities themselves are created by state legislatures.[15] Indeed, some are explicitly described as state agencies or political subdivisions under state law.[16] Each council

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15. *See, e.g.*, ARIZ. REV. STAT. §3-1232; ARK. CODE ANN. §2-35-303; CAL. FOOD & AGRIC. CODE §64591; COLO. REV. STAT. §35-57-104(1); DEL. CODE ANN. tit. 3, §704(a); FLA. STAT. ANN. §573.112; IDAHO CODE §25-2901; 505 ILL. COMP. STAT. 25/4; IND. CODE §15-4-3.5-3; LA. REV. STAT. ANN. §3:555.4; MICH. COMP. LAWS §287.603; MINN. STAT. §17.54; MO. REV. STAT. §275.320; MONT. CODE ANN. §80-11-510; N.J. STAT. ANN §4:10-52; N.M. STAT. ANN. §77-2A-3; N.Y. AGRIC. & MKTS. LAW §294(9); N.D. CENT. CODE §4-34-03; OHIO REV. CODE ANN. §924.07; OR. REV. STAT. §577.210; 3 PA. CONS. STAT. §4504; S.C. CODE ANN. §46-17-190; TENN. CODE ANN. §43-29-118; TEX. AGRIC. CODE §41.051; VA. CODE ANN. §3.1-796.15; WASH. REV. CODE §16.67.040; WIS. STAT. §96.10; WYO. STAT. ANN. §11-37-103.

16. *See, e.g.*, ARIZ. REV. STAT. §3-1232(D) (referring to Arizona council members as "state officers"); COLO. REV. STAT. §35-57-104(1) (creating Colorado council as "a political subdivision of the state"); LA. REV. STAT. ANN. §3:555.4(A) (referring to Louisiana council as an agency within the State Department of Agriculture); MICH. COMP. LAWS §287.603 (creating Michigan council within the State Department of Agriculture); TEX. AGRIC. CODE §41.052 (providing that a state commodity marketing board is a "state agency" and "governmental unit" for certain purposes); VA. CODE ANN. §3.1-796.15 (describing Virginia council as an entity within the State Department of Agriculture); WASH. REV. CODE §16.67.095 (decreeing that Washington council "speak[s] on behalf of Washington state government"); WYO. STAT. ANN. §11-37-103 (declaring that Wyoming council is an entity within the State Department of Agriculture).

has primacy in its own State because Congress dictated that there can be only one council in each State. 7 U.S.C. §2904(8)(C). And, by law, all councils must satisfy the criteria outlined in the Beef Act and Beef Order to engage in generic advertising under the Act. 7 U.S.C. §2902(14); 7 C.F.R. §1260.181. For these reasons, the qualified state beef councils operate as governmental entities when they engage in advertising activities authorized by the Act. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (indicating that state-established program to advance the State's own message would be government speech).

Congress also has specified the particular message the state beef councils should convey by requiring them to engage in beef "promotion," which the Act defines as "advanc[ing] the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. §2902(13), (14). The Secretary has imposed additional limits on the councils' activities in the Beef Order. 7 C.F.R. §1260.181(b). For example, the councils' advertising is subject to the same constraints imposed on national projects, *id.*, §1260.181(b)(1), which prohibit "reference to a brand or trade name of any beef product . . . without the approval of the Board and the Secretary," *id.*, §1260.169(d). And the councils may not use checkoff funds under the Act for a message that aims to "influenc[e] governmental policy or action" or uses "any unfair or deceptive acts or practices." *Id.*, §1260.181(b)(7). Circumscribing the state beef councils' message in this manner reflects a carefully designed program of government speech.

Finally, ultimate control over the state beef councils' advertising activities under the Act is vested in a politically accountable official, the Secretary of Agriculture. The Secretary appoints all members of the Beef Board, 7 U.S.C. §2904(1), which in turn certifies beef-promotion entities as qualified state beef councils, thereby enabling them to engage in advertising under the

Act, 7 C.F.R. §1260.181(a). Through the Beef Board, the Secretary also may require the state beef councils to furnish reports and information about their activities. *See id.*, §1260.181(b)(6). And as the Secretary observes, in practice she exercises substantial control over the message conveyed by the state beef councils through the Department's Agricultural Marketing Service. Pet. at 17-18. The Secretary reviews the state projects and even directs state beef councils to undertake certain programs. Trial Tr.206-07, 294-96; *see also Charter*, 230 F.Supp.2d, at 1125 (observing that "any checkoff-funded project developed by a Qualified State Beef Council must meet USDA approval").[17] Such control is characteristic of government speech. *See Southworth*, 529 U.S., at 229 (indicating that state control over message content suggests government speech).

In sum, the state beef councils' direct role in conveying the promotional message authorized by the Beef Act confirms the Secretary's analysis that this message constitutes government speech. *See* Pet at 14-18. Accordingly, this case provides the Court with an excellent vehicle to resolve the question reserved by *United Foods* regarding application of the government speech doctrine to commodity-marketing programs.

B. The Unresolved Questions Concerning the Government-Speech Doctrine May Implicate Other State Commodity-Marketing Programs.

In addition, the Court's review is warranted because the unresolved questions about application of the government-speech doctrine may substantially affect other state commodity-marketing programs. Congress has established several generic advertising

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17. The Secretary's substantial control over these state projects does not offend federalism principles, as the States have voluntarily chosen to accept checkoff funds in exchange for being subject to the Secretary's authority and direction.

programs similar to the Beef Act program that also operate in part through state and regional organizations.[18] And almost all States have created their own commodity-marketing programs,[19] some of

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18. *See, e.g.*, 7 U.S.C. §2113 (cotton); 7 U.S.C. §2717 (eggs); 7 U.S.C. §4501 (dairy products); 7 U.S.C. §6407 (fluid milk); *see also* 7 C.F.R. §1216.3 (peanuts).

19. *See, e.g.*, ALA. CODE §§2-8-1 to -22 (cattle), 2-8-40 to -62 (swine), 2-8-80 to -103 (soybeans), 2-8-120 to -137 (nuts, bulbs, fruits, and vegetables), 2-8-150 to -171 (eggs and egg products), 2-8-190 to -211 (cotton and cotton products), 2-8-230 to -252 (grain), 2-8-270 to -291 (catfish), 2-8-310 to -326 (sheep and goats), 2-13-110 to -125 (dairy products); ARIZ. REV. STAT. §§3-581 to -594 (grain), 3-1231 to -1239 (beef); ARK. CODE ANN. §§2-35-401 to -407 (beef); CAL. FOOD & AGRIC. CODE §§58601-59293 (general), 64001-64322 (dairy products), 64501-64736 (beef), 65500-65675 (table grapes), 67001-67143 (avocados), 68001-68140 (kiwifruit), 69001-69114 (pistachios), 71000-71138 (rice), 72001-72135 (wheat), 74750-74796 (grape rootstock), 74801-74996 (winegrapes), 75501-75656 (apples), 76201-76384 (sheep), 76501-76961 (salmon), 77001-77195 (walnuts), 77201-77376 (pepper), 77401-77500 (strawberries), 77501-77666 (forest products), 77701-77886 (dates), 77901-78006 (cut flowers), 78201-78305 (asparagus), 78601-78725 (tomatoes), 79000-79145 (sea urchins); COLO. REV. STAT. §§35-28-102 to -123 (general), 35-57-101 to -120 (beef); DEL. CODE ANN. tit. 3, §§702-717 (general); FLA. STAT. ANN. §§573.101-.124 (general), 601.01-.992 (citrus); GA. CODE ANN. §§2-8-1 to -79 (general); IDAHO CODE §§22-1201 to -1215 (potatoes), 22-2801 to -2810 (honey), 22-2911 to -2923 (beans), 22-3101 to -3117 (hops), 22-3301 to -3319 (wheat), 22-3501 to -3518 (peas and lentils), 22-3601 to -3616 (apples), 22-3701 to -3716 (cherries), 22-3801 to -3816 (mint), 22-4001 to -4019 (barley), 22-4201 to -4218 (alfalfa and clover seed), 25-2901 to -2912 (beef), 25-3101 to -3123 (dairy products), 25-3401 to -3407 (pork); 505 ILL. COMP. STAT. 25/1-25/16 (beef), 40/1-40/23 (corn), 95/1-95/21 (milk), 115/1-115/23 (sheep and wool), 130/1-130/25 (soybeans), 145/1-145/110 (wheat); IND. CODE §§15-4-3.5-1 to -10 (general), 15-4-10-1 to -31 (corn); IOWA CODE §§181.1-.20 (beef), 182.1-.24 (sheep and wool), 183A.1-.14 (pork),

185.1-.34 (soybeans); KAN. STAT. ANN. §§2-3001 to -3013 (grain); KY. REV. STAT. ANN. §§247.450-.505 (dairy products), 247.4451-.4483 (milk), 247.510-.595 (soybeans), 247.5061-.5095 (small grain), 247.610-.685 (beef cattle), 247.6001-.6035 (corn), 247.6901-.6957 (sheep and lamb), 247.850-.865 (eggs); LA. REV. STAT. ANN. §§3:451-458 (sweet potatoes), 3:471-478 (strawberries), 3:551.1-.12 (eggs) 3:551.31-.36 (soybeans & grain), 3:551.61-.68 (rice), 3:551.81-.85 (pork); 3:552.1-.26 (general), 3:555.1-.13 (beef), 3:556.1-.13 (crawfish), 3:557.1-.12 (dairy products); ME. REV. STAT. ANN. tit. 7, §§401-403 (general), 991-994 (potatoes), 2151-2157 (seed potatoes), 2991-2994 (dairy products); MD. CODE ANN., AGRIC. §§10-101 to -116 (general); MASS. GEN. LAWS ch. 128, §§102-115 (apples); MICH. COMP. LAWS §§287.601-.610 (beef), 290.421-.429a (potatoes), 290.551-.568 (beans), 290.651-.674 (general); MINN. STAT. §§17.50-.69 (general); MISS. CODE ANN. §§69-7-251 to -275 (eggs), 69-9-1 to -13 (soybeans), 69-10-1 to -13 (rice), 69-35-1 to -33 (dairy products), 69-43-1 to -13 (ratite), 69-45-1 to -15 (general); MO. REV. STAT. §§275.300-.370 (general), 275.450-.455 (aquaculture), 275.460-.468 (wine); MONT. CODE ANN. §§80-11-201 to -224 (wheat and barley), 80-11-301 to -313 (alfalfa seed), 80-11-401 to -419 (mint and mint oil), 80-11-501 to -519 (general); NEB. REV. STAT. §§2-1801 to -1826 (potatoes), 2-2301 to -2321 (wheat), 2-3325 to -3331 (soybeans), 2-3401 to -3416 (poultry and eggs), 2-3601 to -3635 (corn), 2-3735 to -3765 (dry beans), 2-3801 to -3812 (general), 2-3948 to -3964 (dairy products), 2-4001 to -4020 (grain sorghum); NEV. REV. STAT. §§584.031-.093 (dairy products), 584.325-.419 (fluid milk and fluid cream), 587.131-.185 (alfalfa seed); N.H. REV. STAT. ANN. §§434:33-:40 (apples); N.J. STAT. ANN. §§4:10-43 to -75 (general), 4:10-76 to -79 (wine); N.M. STAT. ANN. §§77-2A-1 to -9 (beef), 77-8A-1 to -11 (sheep and goats); N.Y. AGRIC. & MKTS. LAW §§292-295 (general); N.C. GEN. STAT. §§106-266.6 to -266.21 (milk and cream), 106-550 to -568 (general); N.D. CENT. CODE §§4-10-01.1 to -22 (potatoes), 4-10.2-01 to -13 (oilseed), 4-10.3-01 to -13 (edible beans), 4-10.4-01 to -14 (barley), 4-10.5-01 to -14 (soybeans), 4-10.6-01 to -16 (corn), 4-10.7-01 to -17 (dry peas and lentils), 4-12.1-01 to -09 (honey), 4-13.1-01 to -13 (turkey), 4-27-01 to -12 (dairy products), 4-28-01 to -09 (wheat), 4-34-01 to -14 (beef); OHIO REV. CODE ANN. §§924.01-.99 (general); OKLA. STAT. ANN. tit. 2, §§18-50 to -62

which may closely resemble the Beef Act.

Indeed, the Court's invalidation of the Mushroom Act advertising provisions in *United Foods* has since spawned a flood of litigation seeking to enjoin other commodity-marketing programs on First Amendment grounds.[20] Some courts and

(peanuts), 18-240 to -251 (sorghum); OR. REV. STAT. §§576.062(1), (dairy products), (2) (filbert), (3) (dungeness crab), (4) (salmon), (5) (albacore), (6) (grain), (7) (sheep), (8) (potatoes), (9) (alfalfa seed), (10) (Bartlett pears), (11) (blueberries), (12) (clover seed), (13) (fine fescue), (14) (fryers), (15) (highland bentgrass), (16) (hops), (17) (mint), (18) (orchardgrass seed), (19) (processed vegetables), (20) (raspberries and blackberries), (21) (ryegrass), (22) (strawberries), (23) (sweet cherries), (24) (tall fescue), (25) (trawl), (26) (onions), 577.010-.990 (beef), 578.010-.990 (wheat); 3 PA. CONS. STAT. §§4501-4513 (general); S.C. CODE ANN. §§46-17-10 to -470 (general); S.D. CODIFIED LAWS §§38-10-1 to -41 (wheat), 38-27-1 to -19 (oilseeds), 38-29-1 to -14 (soybeans), 38-32-1 to -24 (corn), 38-33-1 to -12 (pork); TENN. CODE ANN. §§43-20-201 to -216 (soybeans), 43-29-101 to -120 (general); TEX. AGRIC. CODE §§41.001-.127 (general), 41.151-.164 (beef), 47.001-.055 (oysters and shrimp); UTAH CODE ANN. §§4-21-1 to -5 (beef), 4-22-1 to -10 (dairy products); VT. STAT. ANN. tit. 6, §§2961-2965 (general), 2971-2989 (dairy products); VA. CODE ANN. §§3.1-425 to -461 (milk), 3.1-618 to -636 (apples), 3.1-647 to -665 (peanuts), 3.1-666 to -684 (sweet potatoes), 3.1-684.2 to -684.19 (soybeans), 3.1-684.20 to -684.41 (Irish potatoes), 3.1-684.41 to -684.58 (small grains), 3.1-796.02 to -796.020 (poultry), 3.1-796.11:2 to -796.11:10 (eggs), 3.1-796.13 to -796.28 (cattle), 3.1-1031 to -1049 (cotton), 3.1-1065 to -1079 (sheep), 3.1-1081 to -1103 (cotton); WASH. REV. CODE §§15.24.010-.920 (apples), 15.28.010-.910 (soft tree fruit), 15.44.010-.910 (dairy products), 15.65.010-.910 (general), 15.66.010-.900 (general), 15.88.010-.902 (wine), 16.67.010-.920 (beef); W. VA. CODE §§19-2G-1 to -10 (tree fruit); WIS. STAT. §96.01-.20 (general); WYO. STAT. ANN. §11-36-101 to -110 (dairy products), 11-37-101 to -110 (beef), 11-38-101 to -110 (wheat).

20. *See, e.g.*, *Pelts & Skins*, 2004 WL 725275, at *1 (alligator products); *Cochran*, 359 F.3d, at 266 (milk); *Mich. Pork Producers*, 348 F.3d, at 160

commentators have framed such challenges as turning on a binary inquiry into whether the contested program more closely approximates the tree-fruit statute upheld in *Glickman*, or the Mushroom Act provisions struck down in *United Foods*.[21] In this

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(noting that First Amendment challenge to Pork Act was added after *United Foods*); *Orleans Int'l, Inc. v. United States*, 334 F.3d 1375 (CA Fed. 2003) (beef); *Bidart Bros. v. Cal. Table Grape Comm'n*, No. CIV-F-03-5925-REC-DLB (E.D. Cal. filed July 7, 2003); *JW DeWit Farms, Inc. v. Minn. Cultivated Wild Rice Council*, No. 0:03-cv-03264-JNE-JGL (D. Minn. filed May 23, 2003); *Avocados Plus, Inc. v. Veneman*, No. 1:02-cv-01798-GK, slip op. (D.D.C. Apr. 14, 2003), *appeal dismissed*, Nos. 03-5086 & 03-5101, slip op. (CADC Nov. 24, 2003); *In re Wash. State. Apple Adver. Comm'n*, 257 F.Supp.2d 1290, 1295 (E.D. Wash. 2003) (noting specifically that "[t]he present litigation was filed in response to *United Foods*"); *In re Foster Enters.*, 62 Agric. Dec. 8 (U.S.D.A. 2003) (eggs); *Boghosian Raisin Packing Co. v. Lyons*, No. 03AS05313 (Sacramento County Super. Ct. filed Sept. 23, 2003); *Felix Costa & Sons v. Lyons*, No. 03AS03433 (Sacramento County Super. Ct. filed June 20, 2003) (cherries); *Bidart Bros. v. Calif. Apple Comm'n*, No. 01-CE-CG-02550 (Fresno County Super. Ct. filed July 27, 2001). In addition, administrative petitions challenging the federal cotton, honey, and watermelon programs have been filed with the Department of Agriculture.

21. *See, e.g., Pelts & Skins*, 2004 WL 725275, at *6 (stating that court must "determine whether Louisiana alligator producers are more like mushroom producers than like peach producers") (citation and quotation omitted); *Cochran*, 359 F.3d, at 268 (describing court's task as "determining the side on which the axe must fall—on *Glickman* or on *United Foods*"); *Mich. Pork Producers*, 348 F.3d, at 162 (noting that "the constitutionality of the Pork Act turns on whether pork is more like mushrooms or more like peaches"); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895, 896 (CA9 2003) (describing issue in case as whether "the grape growers [are] more like the nectarine, plum, and peach growers, or more like the mushroom growers"); F.J. Dindinger, *Free Speech for Mushrooms but not Peaches: Economic Regulations After* United Foods, Inc., 31 COLO. LAW. 61 (Apr. 2002).

case, beef is neither mushroom nor plum. Rather, promotion under the Beef Act is government speech, controlled and directed by the federal and state governments.

Resolution of many challenges to state commodity-marketing programs may well depend, not on analogies to *Glickman* or *United Foods*, but on the question not addressed by the Court in either decision—whether the challenged programs involve government speech. Several lower courts have noted that the Court has not yet addressed this issue,[22] which is squarely presented here. Accordingly, the Court should grant review to resolve the government-speech question it expressly reserved in *United Foods* and thereby provide guidance to courts faced with First Amendment challenges to commodity-marketing programs.

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22. *See, e.g., Pelts & Skins*, 2004 WL 725275, at *9 n.12 ("The Supreme Court has not determined how the government speech doctrine applies to compelled subsidies for generic marketing. Neither of the two Supreme Court cases addressing mandatory assessments for generic marketing considers the question of government speech."); *Cochran*, 359 F.3d, at 273 n.9 ("The two decisions of the Court involving commodity promotion programs do not address the issue of government speech."); *Mich. Pork Producers*, 348 F.3d, at 161 ("But the Court has yet to consider whether programs similar in nature to the Pork Checkoff Program constitute governmental speech . . . ."); *JW DeWit Farms, Inc. v. Minn. Cultivated Wild Rice Council*, No. 0:03-cv-03264-JNE-JGL (D. Minn. Mar. 12, 2004) (order staying litigation challenging Minnesota wild rice checkoff program pending Court's decision on petitions for writ of certiorari in this case and *Michigan Pork Producers*).

CONCLUSION

The Court should grant the petition for writ of certiorari.

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